BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DAVID STUART FYFFE	)	
Claimant	)	
VS.	)	
	)	
SEARS ROEBUCK & COMPANY	)	
Respondent	)	Docket No. 1,061,641
AND	)	
	)	
INDEMNITY INSURANCE COMPANY	)	
OF NORTH AMERICA	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) appealed the March 12, 2014, Award entered by Administrative Law Judge (ALJ) John D. Clark. The Board heard oral argument on July 23, 2014, in Wichita, Kansas.

APPEARANCES

Joseph Seiwert of Wichita, Kansas, appeared for claimant. John D. Jurcyk of Kansas City, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. The parties stipulated respondent paid claimant $10,307.14 in temporary total disability benefits (TTD) from January 14, 2012, through May 22, 2012, and temporary partial disability benefits (TPD) of $6,923.93 from May 23, 2012, through September 30, 2012, for a total of $17,231.07. The parties agreed that under K.S.A. 2011 Supp. 44-510e(a)(2)(F), $17,231.07 should be divided by claimant's $555 weekly benefit rate, which calculates to 31.05 weeks of TTD. When calculating claimant's entitlement to permanent partial disability benefits (PPD), the first 15 weeks of TTD are excluded from the 31.05 weeks, which calculates to 16.05 weeks of TTD. The 16.05 weeks are subtracted from 415 weeks, entitling claimant to a maximum of 398.95 weeks of PPD.

ISSUES

In this claim for a January 13, 2012, injury by accident, ALJ Clark found claimant was entitled to receive PPD based upon a 20% whole body functional impairment. The ALJ also awarded claimant TTD, but was silent as to TPD respondent paid claimant.

Respondent requests the Board find claimant failed to prove he suffered permanent impairment related to his eye, rib, head and alleged neck injuries. Respondent, therefore, contends claimant is only entitled to compensation for his left shoulder permanent impairment.

Claimant asserts his award should be based upon a 30% whole body functional impairment.

The sole issue before the Board on this appeal is the nature and extent of claimant's disability.

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds:

On January 13, 2012, claimant was involved in a motor vehicle accident while driving respondent's van to a customer's home. Claimant's job was to repair appliances in customers' homes. Claimant sustained a left orbital fracture, nasal fracture, mild concussion, broken left shoulder clavicle, seven broken ribs, punctured lung and injured his neck. Claimant's left eyelid was torn off and had to be sewn back on and a loose tooth required treatment.

Claimant testified he underwent two courses of treatment for his left eye/orbital fracture. He testified that as a result of the accident his left eye was lower than it was supposed to be and he had constant double vision. An unsuccessful attempt was made to repair the left orbital floor where some bones were broken. Then a titanium plate was placed in the area of the left orbital floor, which improved claimant's double vision. Claimant underwent vision therapy with Dr. Joseph B. Sullivan, which further improved his double vision. Claimant testified his eyes get tired easily because they do not focus quickly and easily. When claimant's eyes are tired, he experiences double vision. If his eyes are tired when driving, road signs are blurred and he has glasses to correct that. He also has constant double vision when looking down at objects.

Claimant testified he has a balance problem, which bothers him more than the double vision. He also experiences chest discomfort occasionally when lifting things in a certain manner and limits the amount of weight he lifts. Claimant also indicated that since the accident, he has trouble remembering things.

Claimant voluntarily terminated his employment with respondent because he could not keep up the hectic pace and work 10 or 11 hours every day. Claimant is now self-employed repairing appliances. He works five hours a day and takes breaks when tired and lies down.

Four doctors testified concerning the nature and extent of claimant's disability. Drs. Sullivan and Sam N. Cohlmia limited their examination and treatment to claimant's left eye injury. Dr. Sullivan is a Fellow in the College of Optometrists in Vision Development. He graduated from the Illinois College of Optometry with a certificate in Vision Therapy. When he was deposed, the doctor was the Chairman of the Vision Therapy Committee of the Kansas Optometric Association. The doctor's Curriculum Vitae indicated he was a guest lecturer on vision therapy at several optometry schools and was on the clinical staff at Via Christi Rehabilitation Center.

Dr. Sullivan conducted 30 vision therapy sessions with claimant from March 28, 2012, through December 28, 2012. The doctor indicated he was asked to work with claimant by a person at the insurance company in charge of claimant's case. Dr. Sullivan testified claimant's left inferior rectus muscle was not working correctly because of muscle paresis. Claimant had strabismus, which means his eyes did not work together, and diplopia, or double vision. When the doctor began working with claimant, at 20 degrees inferior gaze there was a 17 prism diopter deviation. At the end of therapy, in straight ahead gaze there were 2½ prism diopters out of the distance and 1½ at near.

Dr. Sullivan opined, using Chapter 8 of the *Guides*,[1] that claimant had a 20% loss of vision function that converted to a 5% whole person functional impairment. The doctor indicated the rating reflected an injury to claimant's visual system, which consists of both eyes. He explained that for a rating for double vision, both eyes must be considered. The doctor testified he did not expect claimant's condition to improve after their last appointment in December 2012.

Dr. Cohlmia is a member of the American Academy of Ophthalmology and a clinical professor of ophthalmology at the University of Kansas School of Medicine. The doctor saw claimant on two occasions – January 25, 2012, and July 17, 2013. The doctor opined, pursuant to the *Guides*, claimant had a zero percent functional impairment for his eye injury. He indicated that in order for someone to have an impairment for diplopia under the *Guides*, they need to have an abnormal ocular motility and claimant's was normal. The doctor indicated that under Section 8.5 of the *Guides*, he could have assigned an impairment based upon claimant's orbital fracture, but did not because it was repaired. Nor did he assign claimant a functional impairment under other abnormalities noted on the first page of Chapter 8 of the *Guides*.

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[1] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

On cross-examination, Dr. Cohlmia acknowledged he did not review Dr. Sullivan's records. Dr. Cohlmia indicated claimant made complaints of double vision with down gaze and left gaze, but that did not constitute a finding of double vision. He indicated claimant made subjective complaints of double vision, but there was no objective finding. Dr. Cohlmia admitted double vision is always based upon a patient's subjective complaints. The doctor did not do a measurement of the point at which claimant had double vision because claimant's muscles moved normally. He admitted not consulting Figure 3, Chapter 8 of the *Guides* when he prepared his letter of July 17, 2013, in which he indicated claimant's eye examination on that date was normal. The doctor agreed Chapter 8 of the *Guides* has a process to determine an individual's impairment of the visual system and of the whole person. Dr. Cohlmia admitted he did not follow the third step[2] of the process, which is a measurement of the point at which the diplopia begins.

Claimant was also evaluated at the request of his counsel by Dr. Pedro A. Murati on January 30, 2013. The doctor testified as follows concerning claimant's permanent functional impairment:

> Q. And what kind of permanent impairment did you find?
>
> A. Well, the costochondritis and sternochondritis, using the Pain Chapter, I gave 3 percent each. Post concussion syndrome, Chapter 4, Table 2, that's 5 percent whole person. For the severe crepitus of the left shoulder, 18 percent upper extremity, which converts to 11 percent whole person. The neck sprain is a typical DRE II Category Cervicothoracic for 5 percent whole person. Trigeminal neuropathy, Chapter 4, Table 9, that's 3 percent whole person. For the left binocular diplopia, using Table 6, page 218, that's 10 percent visual impairment, which converts to 9 percent whole person. And all of those combine to 33 percent whole person.
>
> Q. Okay. And, Doctor, if you would, if you were to back out the 9 percent for the binocular diplopia, what would your rating be?
>
> A. Okay. Let's see.
>
> Q. And then a follow-up question to that, just if you're looking, is going to be if we were to replace it with 5 percent, what would it be?
>
> A. Okay. Well, if you have 33 and you take away 9, you end up with 26 percent whole person, and if you add 5 to that, that comes up to 30 percent whole person.[3]

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[2] The *Guides* contains five steps to determine impairment of the visual system and of the whole person.

[3] Murati Depo. at 13-14.

Dr. Murati indicated the functional impairment for costochondritis and sternochondritis was assessed for complaints of pain, and he acknowledged there was no objective study that shows the condition of chronic pain. He acknowledged the *Guides* has no table that addresses a functional impairment for costochondritis and sternochondritis. The doctor indicated his left shoulder functional impairment rating was based upon loss of range of motion, which he measured with a goniometer.

Dr. Murati indicated his functional impairment rating for the neck was based on loss of range of motion and the fact x-rays showed reverse lordosis in the neck. The doctor testified claimant has limited extension, flexion, lateral flexion to the left and right, and left and right rotation. However, Dr. Murati admitted he did not measure claimant's loss of range of motion of the neck.

Dr. Murati gave a 3% functional impairment rating for neuropathy of the trigeminal nerve. The doctor explained he did so because claimant had a severe blow-out fracture involving the zygomatic arch where the maxillary nerve comes out, which was damaged permanently. The maxillary nerve is one of the three branches of the trigeminal nerve.

Dr. Paul S. Stein evaluated claimant on June 11, 2013, at respondent's request. Claimant reported soreness at times in the left chest area and around the left eye and occasional dizziness. The doctor indicated claimant had no tenderness to palpation over the cervical spine, trapezius or shoulders and cervical range of motion was intact.

Dr. Stein indicated claimant was at maximum medical improvement, other than a possible left shoulder and clavicle injury. The doctor noted claimant had some limitation of left shoulder range of motion. He indicated claimant had no functional impairment as a result of his head injury, rib fractures or facial fractures. With regard to claimant's diplopia, Dr. Stein deferred to Dr. Cohlmia. Dr. Stein initially did not give claimant a functional impairment rating for the left shoulder, and requested claimant undergo x-rays and an MRI of the left shoulder. According to Dr. Stein, claimant refused to undergo an MRI. After reviewing x-rays of the left clavicle taken on December 16, 2013, Dr. Stein opined in a January 5, 2014, report that claimant had a 4% functional impairment to the left upper extremity at the level of the shoulder, which converts to a 2% whole person functional impairment. His opinion was based upon claimant's loss of range of motion of the left shoulder. The doctor indicated the only part of claimant's left shoulder injured in the accident was his clavicle.

The ALJ found:

> This Court finds the opinions of Dr. Stein to be as conservative as the opinions of Dr. Murati's opinions to be liberal, and gives equal weight to opinions of both physicians, and therefore finds that the Claimant has a 15 percent impairment of function to the body as a whole, not including his visual impairment. The Court adopts the opinions of Dr. Sullivan for his visual impairment, and finds that he has

> a five percent impairment of function to the body as a whole. When combining the visual injuries with the Claimant's other work-related injuries, this Court finds that the Claimant has a 20 percent impairment of function to the body as a whole.[4]

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.[5] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act."[6]

The Board concurs with the ALJ that Dr. Sullivan's functional impairment rating for claimant's left eye issue is more credible than that of Dr. Cohlmia. Admittedly, Dr. Sullivan is an optometrist, while Dr. Cohlmia is an opthalmologist and Dr. Cohlmia's last evaluation occurred several months after claimant completed vision therapy with Dr. Sullivan. However, Dr. Sullivan is an expert in vision therapy, saw claimant 30 times over 9 months and opined claimant's diplopia would not improve further. Dr. Cohlmia only saw claimant two times. Dr. Sullivan testified claimant's left inferior rectus muscle was not working correctly. Dr. Sullivan measured claimant's diplopia before and after he completed vision therapy.

Dr. Cohlmia examined claimant twice and did not have Dr. Sullivan's reports. Dr. Cohlmia indicated claimant had normal ocular motility. However, the doctor never measured claimant's double vision, admitted he did not consult Figure 3, Chapter 8 of the *Guides* when he prepared his July 17, 2013, letter and determined claimant's titanium-repaired eye socket merited no functional impairment rating. Figure 3, Chapter 8 of the *Guides* deals with percentage loss of ocular motility of one eye in diplopia fields. Section 8.3 of Chapter 8 of the *Guides* at page 8/217 states: "Unless a patient has diplopia within 30° of the center of fixation, the diplopia rarely causes significant visual impairment. An exception is diplopia on looking downward."[7] Claimant testified and Dr. Sullivan verified through measurement that claimant has diplopia when looking downward.

The Board concurs with the ALJ's finding that excluding claimant's vision impairment, he sustained a 15% whole body functional impairment. The functional

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[4] ALJ Award at 6.

[5] K.S.A. 2011 Supp. 44-501b(c).

[6] K.S.A. 2011 Supp. 44-508(h).

[7] Cohlmia Depo., Ex. 4.

impairment ratings of Drs. Murati and Stein are widely divergent. Dr. Murati, hired by claimant, gives credence and weight to claimant's subjective complaints of occasional dizziness, limited range of motion in the neck and rib pain on the left side. Dr. Stein, hired by respondent, indicated there was no objective evidence of a soft tissue shoulder injury, but indicated he could not rule that out. Given the severe injuries claimant sustained as a result of his work-related motor vehicle accident, Dr. Stein minimizes claimant's functional impairment. On the other hand, Dr. Murati, in arriving at his functional impairment rating, relied heavily on claimant's subjective complaints. Therefore, excluding claimant's visual impairment, the Board, like the ALJ, gives equal weight to the functional impairment ratings of Drs. Murati and Stein.

The ALJ combined Dr. Sullivan's 5% whole body functional impairment for claimant's vision with 15% based upon the ratings of Drs. Murati and Stein for a 20% whole body functional impairment. However, under the Combined Values Chart of the *Guides*, a 15% whole person functional impairment and a 5% whole person functional impairment combine for a 19% whole person functional impairment. The Board has authority to correct calculations. In *Reyes*,[8] the Board corrected a calculation where the ALJ did not correctly average three task loss opinions of two physicians. In *Davenport*,[9] the ALJ used incorrect figures to calculate task loss. Neither party raised the issue on appeal. The Board corrected the error, indicating it was a calculation error.

CONCLUSION

Claimant sustained a 19% whole person functional impairment.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[10] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board modifies the March 12, 2014, Award entered by ALJ Clark, as follows:

Claimant is granted compensation from respondent and its insurance carrier for a January 13, 2012, accident and resulting disability. Based upon an average weekly wage

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[8] *Reyes v. Centimark Corporation*, No. 1,007,295, 2010 WL 1445590 (Kan. WCAB Mar. 8, 2010).

[9] *Davenport v. Marcon of Kansas*, Nos. 1,034,647 & 1,043,900, 2014 WL 2616648 (Kan. WCAB May 30, 2014), *appealed to the Kansas Court of Appeals* (June 2014).

[10] K.S.A. 2013 Supp. 44-555c(j).

of $930.12, claimant is entitled to receive 18.57 weeks of temporary total disability benefits at $555 per week, or $10,307.14, followed by $6,923.93 in temporary partial disability benefits, followed by 75.80 weeks of permanent partial disability benefits at $555 per week, or $42,069, for a 19% whole body functional impairment, making a total award of $59,300.07, which is all due and owing, less any amounts previously paid.

The record contains a filed attorney fee agreement between claimant and his attorney, but the ALJ did not approve the contract. K.S.A. 44-536(b) mandates the written contract between the employee and the attorney be reviewed and approved by the Director. This matter is remanded to the ALJ to address approval of the attorney fee contract.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of September, 2014.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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Honorable Ali N. Marchant, Administrative Law Judge